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Revolutionary constitutionalism

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One important recent trend in constitution-making around the world has been revolutionary constitutionalism: using the constitution-making process to attempt to institutionalize and bring to a successful conclusion a political revolution. Although a good deal of attention has been paid to the specific revolutions involved, there has been far less on the general phenomenon of revolutionary constitutionalism as such. This article attempts to begin redressing this gap by offering some reflections on the general phenomenon and then employing them to inform an analysis of constitution-making in the revolutionary context. It makes three main claims. The first is that revolutionary constitutionalism is a useful category within comparative constitutional law. Empirically, it encompasses a range of situations that implicate constitutionalism in a particular way and raise special challenges. Analytically, it is a distinct concept from the neighboring term "constitutional revolution." Recognizing this permits us to distinguish between, for example, the New Deal constitutional revolution and the American Revolution. The second is that revolutionary constitutionalism contains within itself certain paradoxes and practical problems that have their source in the combination of initial radical transition and subsequent resistance to further radical change that constitutionalization brings. The final claim concerns the role and importance of constitution-making in the revolutionary context. Although relative to a broad array of socio-political variables, this role is generally less central to the ultimate outcomes of revolutionary constitutionalism than constitutional lawyers often think, it can respond to one distinctive challenge: the need to reestablish political authority lost by the old regime. As the comparison between post-2011 experiences in Egypt and Tunisia suggests, constitution-making can make a key contribution here as one source of the legitimacy that the new regime must acquire.

1. Introduction

Over the past twenty years or so, there have been at least two important and highly visible trends in constitution-making around the world. The first is revolutionary

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constitutionalism: using the constitution-making process to attempt to institutionalize and bring to a successful conclusion a political revolution.[1] Major examples of this have been South Africa and the countries of the so-called Arab Spring. Alongside this "classic" or primary version of revolutionary constitutionalism there has also arguably developed a newer or secondary one: an electorally successful revolutionary movement employing the constitution-making process as a means towards the radical transformation of the polity it aims to bring about. Here, the political revolution mostly *follows* rather than precedes the constitution-making process. Venezuela is the major example, and perhaps also Bolivia.

Like the more classic "revolution to constitutionalism" version, this "constitutionalism to revolution" scenario can easily go awry, and when it does it tends to overlap with the second important, and more disturbing, trend in contemporary constitution-making: what has helpfully been termed "abusive constitutionalism."[2] This consists in using the constitution-making (and amendment) process as a tool of ordinary rather than higher politics to entrench an existing or newly empowered government's position through measures that concentrate its power and render successful electoral opposition more difficult. The best-known instance of this second trend is Hungary since 2010.[3] Recognizing the constitutionalism to revolution scenario as a form of revolutionary constitutionalism, however, interestingly complicates characterizing developments in Venezuela or Bolivia in exactly the same way. Can it be said that the constitution-making process is used (simply or primarily) as a tool of ordinary politics where the electorally successful revolutionary movement's open and express goal is to achieve radical transformation of the polity? How or at what point might this version of revolutionary constitutionalism turn abusive? Is a constitutional amendment abolishing presidential term limits sufficient?[4]

In this article, I focus on this first recent trend in constitution-making. Although a good deal of attention has been paid to the specific revolutions involved, there has been far less on the general phenomenon *of* revolutionary constitutionalism as such.[5] Perhaps this is because it was tainted by seeming association with the entire genre

[1] This is a preliminary definition. As will be argued in Section 2, revolutionary constitutionalism involves political revolutions of a certain sort only.

[2] David Landau, *Abusive Constitutionalism*, 47 U.C. Davis L. Rev. 189 (2013).

[3] In Hungary, the then-new Fidesz party government of prime minster Viktor Orban utilized its two-thirds majority in parliament (elected with 52.73% of the vote) to replace the country's constitution in 2012 without an electoral mandate, much public consultation or a referendum with one that, among other things, reduced the independence of the courts by lowering the mandatory retirement age of judges and prosecutors from 70 to 62 and increasing the membership of the constitutional court from 11 to 15. In Poland, the Law and Justice government has also attempted to curb the powers of the constitutional court and concentrate its own since it was elected in October 2015, but so far through ordinary legislation rather than constitutional amendments or replacement.

[4] The 1999 Bolivarian Constitution in Venezuela was amended via referendum to this effect in 2009, following rejection of a similar proposal by referendum in 2007.

[5] For example, neither of the two excellent and otherwise comprehensive recent research handbooks on comparative constitutional law includes a chapter on the subject, or even on the different but related concept of constitutional revolution (discussed in *infra* Section 2). *See* Comparative Constitutional Law (Tom Ginsburg & Rosalind Dixon eds., 2011); The Oxford Handbook of Comparative Constitutional Law (Michel Rosenfeld & András Sajó eds., 2012). Among the few recent works by comparative constitutional scholars that discuss the general phenomenon are Joel Colon-Rios & Allan Hutchinson, *Democracy and*

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of Marxist-inflected thinking that was airbrushed from history almost overnight following the end of the Cold War. This article attempts to begin redressing this gap by offering some reflections on the general phenomenon, as variously manifested both by the contemporary trend and also earlier ones in history, and then employing them to inform an analysis of constitution-making in the revolutionary context. As a preliminary, two features of this more recent eruption of revolutionary constitutionalism seem to distinguish it from older ones: (1) taken together with the immediately preceding round in central and eastern Europe starting in 1989, *as* revolutions they have (notwithstanding some obvious failures) generally been more successful—or at least viewed as more positive developments—than earlier ones in the twentieth century that helped to give the term a bad name (Russia, China, Cuba, etc.) and (2) the latest revolutions have prioritized constitution-making more than those of 1989.[6]

The article begins in Section 2 by seeking to clarify what revolutionary constitutionalism is, how it differs from non-revolutionary constitutionalism, and how it relates both to the neighboring term "constitutional revolution" and to other types of political revolutions. In addition to some hopefully helpful conceptual clarification, this section also aims to explore whether revolutionary constitutionalism is an analytically or normatively useful category. In Section 3, the article identifies certain paradoxes and problems of revolutionary constitutionalism, which mostly have their source in the combination of initial radical transformation and subsequent resistance to further radical transformation that constitutionalization brings. Section 4 briefly sets out the stages of revolutionary constitutionalism and the variations in how it ends. In Section 5, the article returns to constitution-making and considers its role in this context by addressing two specific questions. First, how important is constitution-making per se to the success or failure of episodes of revolutionary constitutionalism, as compared with other, political and sociocultural variables? Second, to the extent that constitution-making does matter in the revolutionary context, what contributes to its success? What features of its process and substance appear to be most important? Drawing on the comparison between post-2011 experiences in Tunisia and Egypt, the article suggests that one important role constitution-making can play in increasing the chance of a successful episode of revolutionary constitutionalism is as one source of the legitimacy that the new regime must establish.

2. What is revolutionary constitutionalism?

Perhaps the paradigm of revolutionary constitutionalism in most peoples' minds is the scenario of a revolutionary movement headed by a charismatic leader or leadership which, having engaged in a long struggle against an authoritarian or tyrannical

Revolution: An Enduring Relationship?, 89(3) Denver L. Rev. 593 (2012); Bruce Ackerman, *Three Paths to Constitutionalism—and the Crisis of the European Union*, 45(4) BJPolS 705 (2015); Richard Albert, *Democratic Revolutions* (unpublished manuscript on file with author). On the concept of constitutional revolution, two recent articles are Gary Jacobsohn, *Theorizing the Constitutional Revolution*, 2(1) J. L. & Courts 1 (2014) and Mark Tushnet, *Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power*, 13(3) Int'l J. Const. L. 639 (2015).

[6] *See* Bruce Ackerman, The Future of Liberal Revolution (1992) (lamenting the failure of Poland in particular to make writing a new constitution a top priority after the fall of communism).

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regime of one stripe or another, gradually wins the support of the people through its dedication and self-sacrifice in the name of their freedom for an eventual uprising that first topples and replaces the government, then constitutionalizes the revolutionary principles in a new founding document. In fact, this precise scenario is extremely rare in history.[7] Far more common is one of two alternatives: (1) the revolutionary movement and leadership which, when the moment finally arrives, engages in a negotiated transfer of power with the old regime rather than a final and decisive confrontation with it, as roughly in India, in many African countries during the 1960s, Poland in 1989, and South Africa between 1990 and 1993, and (2) the leaderless, spontaneous uprising that surprises almost everyone, including any professional revolutionaries that may exist,[8] as with the (first) French Revolution, the 1905 and February 1917 Russian Revolutions, Romania in 1990, and Tunisia and Egypt in 2011. There is also, as mentioned above, the newer possibility of the electoral/constitution-making route to revolution. Given this variety of situations plausibly understood as involving revolutionary constitutionalism, it might be helpful to begin from basics in order to acquire a more precise understanding of the concept and how it differs from neighboring ones.

Revolutionary constitutionalism is a type or variant of constitutionalism, in which the adjective connotes an essential connection with a political revolution. This connection is most commonly that a revolution is the way constitutionalism is introduced into a polity (the "classic" or primary sense), but it can also be that constitutionalism—here, electoral victory followed by constitution-making—is the means employed by a revolutionary movement to achieve its political raison d'être (the newer sense). Revolutionary constitutionalism is therefore to be contrasted with other, *non-revolutionary* types or modes of constitutionalism, such as evolutionary and elite constitutionalism.[9] In the first of these, constitutionalism emerges, and perhaps continues to change, gradually over time in relatively small incremental steps and without significant political discontinuities.[10] In the second, constitutionalism is more or less imposed on a population by one or other branch of its, or a foreign, elite.[11] This contrast concerns source or history, how constitutionalism is introduced into a political order, rather than variations in its content. It does not claim or suggest that, say, the US Constitution or constitutional order is substantively more "revolutionary" than the Norwegian (evolutionary), or Japanese and German (elite).

[7] The American Revolution perhaps comes closest, but the existence and role of the paradigmatic revolutionary movement and leader(ship) is far from clear, requiring a strong reading of the role of George Washington.

[8] Hannah Arendt argued that this is the norm. *See* Hannah Arendt, On Revolution 259 (1963).

[9] *See* Ackerman, *supra* note 5 (distinguishing paradigms of "revolutionary," "insider," and "elitist" constitutionalism).

[10] The UK might be thought of as the classic case here, although the important roles of the seventeenth century English civil war/revolution and "Glorious Revolution" in the establishment of constitutionalism cannot be underestimated. As a result, Norway and Sweden are perhaps better examples.

[11] In the European Union, the development of European constitutionalism is often viewed as the handiwork of the political elite (rather than the public). Postwar Japan is an example of the imposition of constitutionalism by a foreign elite; namely General MacArthur, the occupying Supreme Commander for the Allied Powers, and his small team of constitution drafters.

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Without attempting to navigate competing positions within the large political science and sociology literatures on the topic[12] or to specify a set of necessary and sufficient conditions for a political transformation to be properly termed a revolution, for current purposes revolutions tend to be characterized by the following features. First, a genuine form of mass mobilization, in which the raw, constituent power of the people is directly engaged, absent which the correct designation is likely a coup or rebellion. Second, temporally, revolutions bring about abrupt, sharp, or at least relatively quick, transformations, as distinct from more gradual or extended ones. Third, in terms of the extent of the transformation, revolutions usher in radical or fundamental change rather than reform, and usually involve removal of the existing political regime. Finally, extra-legal or extraordinary modes or processes of change are typically employed (for example, "overthrow"), as distinct from the legal, constituted or ordinary modes, such as elections, lawful successions, and constitutional amendment.[13] It should be noted that violence is not essential, even though of course bloody revolutions are more common in history than peaceful ones.[14] What I have termed the classic or primary version of revolutionary constitutionalism is essentially connected with a political revolution in this core sense. But to a significant extent, so too is the newer or secondary version. Thus, Chávez's "Bolivarian Revolution" involved mass mobilization through his Fifth Republic Movement and later the United Socialist Party of Venezuela, a relatively short timeframe for its radical transformation of political principles and orientation, and extraordinary, if not illegal, modes of change in, for example, holding a popular referendum on establishing a constituent assembly in April 1999 and granting the subsequently elected body supreme power over the other, ongoing institutions.[15]

If the adjective means that revolutionary constitutionalism is essentially connected with a political revolution, the noun requires that it is connected only with political revolutions of a certain sort. Said Arjomand has observed that the 2011 revolutions in Tunisia, Egypt, and Libya were, from the outset, "constitutional revolutions in their intent,"[16] and by this, I take him to mean something quite specific. This specificity is, I think, brought out by the implicit comparison with other types of political revolution, for example totalitarian or theocratic revolutions. While these may well replace authoritarian or absolutist regimes and result in a constitution (the Bolshevik constitution of 1918, the 1979 constitution of the Islamic Republic of Iran), they are not revolutions for constitutionalist goals or purposes; indeed, they may well be anti- or

[12] *See, e.g.*, Jeff Goodwin, No Other Way Out: States and Revolutionary Movements 1945–1991 (2001); Theda Skocpol, States and Social Revolutions (1979); Charles Tilly, European Revolutions 1492–1999 (1995); Jack Goldstone, *Theories of Revolutions: The Third Generation*, 32 World Pol. 425 (1980).

[13] This is why the notion of an "electoral revolution" involves a metaphorical sense of the term. It is also why in the "constitutionalism to revolution" scenario, I stated above that the revolution "mostly" follows rather than precedes the constitution-making process.

[14] Here, like Richard Albert, *supra* note 5, I depart from Arendt's seeming definitional emphasis on the centrality of violence in revolutions. *See* Arendt, *supra* note 8, at 35–39.

[15] Both actions were upheld as constitutional by a closely divided Supreme Court.

[16] Said Amir Arjomand, *Revolution and Constitution in the Arab World, 2011–12*, *in* Beyond the Arab Spring: The Evolving Ruling Bargain in the Middle East 151, 152 (Mehran Kamrava ed., 2014).

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counter-constitutionalist.[17] Accordingly, we may think of revolutionary constitutionalism, at least in its classic or primary version, as essentially connected to constitutional*ist* revolution: a revolution aimed at bringing about the radical transformation of the political order from the old non-constitutionalist regime to a new constitutionalist one. This new political order need not, however, be a specifically "liberal constitutionalist" one. Recent work in comparative constitutional law has helpfully begun to analyze and explore forms of constitutionalism other than liberal or "fully constitutionalist" ones, especially authoritarian versions.[18] Nonetheless, at this end of the spectrum, the difference between authoritarian constitutionalism and pure authoritarianism or absolutism remains, so that if a resulting political order is not consistent with the minimum conception of constitutionalism, it also cannot be an instance of the revolutionary version. More relevant to the Chávez/Morales examples are the possibilities of distinct social democratic and/or socialist constitutionalist alternatives.[19]

There are two main scenarios in which revolutionary constitutionalism occurs in the classic or primary sense: the colonial—or neo-colonial—revolution and internal regime change. The latter is distinguished from both external regime change and internal episodes of constitution-making and replacement that are not the result of revolutions. India, 1960s Africa, and arguably both central and eastern Europe in 1989 and South Africa in the early 1990s (the "neo-colonial" version) are examples of colonial revolutions; the French, Mexican, Russian, and 2011 revolutions in Tunisia and Egypt of the internal regime change. Although in the case of certain colonial revolutions, the arguably minimally constitutionalist nature of the old regime overall might cause one to question its characterization as a non-constitutionalist to constitutionalist transformation, this is not how revolutionaries perceived their situation, or treatment, as colonial subjects. So, for example, despite the Glorious Revolution in England nearly a century earlier, the American revolutionaries understood themselves as faced with and overthrowing an absolute monarch, or at least a tyrannical one.[20]

This leads to the question of the general relationship of revolutionary constitutionalism to the neighboring term "constitutional revolution." Are they always the same thing and, if not, how exactly do they differ? Is the difference significant enough, analytically or normatively, to justify having both in the disciplinary toolbox? Constitutional revolution is a more limited or narrower concept in the sense that its core meaning refers to fundamental change to or within a constitutional order, as

[17] As Arjomand describes the Iranian Revolution of 1979, *id.*

[18] *See* Li-Ann Thio, *Constitutionalism in Illiberal Politics*, *in* The Oxford Handbook of Comparative Constitutional Law, *supra* note 5, 133; Mark Tushnet, *Authoritarian Constititutionalism: Some Conceptual Issues*, *in* Constitutionalism in Authoritarian Regimes 36 (Tom Ginsburg & Alberto Simpser eds., 2014); Mark Tushnet, *Authoritarian Constitutionalism*, 100 Cornell L. Rev. 393 (2015).

[19] On the former, *see* Mark Tushnet, *Editorial: Varieties of Constitutionalism*, 14(1) Int'l J. Const. L. 1, 3 (2016).

[20] Paul Downes, Democracy, Revolution, and Monarchism in Early American Literature 5 (2002) ("The American Revolution's defining gesture, the gesture that gave it the profile of a revolution as opposed to merely an intra-state dispute, was its rejection of the English crown and with it the rejection of absolute monarchy in general. '[We must] besiege the throne of heaven', wrote Thomas Jefferson, 'to extirpate from creation this class of human lions, tigers, and mammoths called kings . . .'").

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distinct from the broader or more encompassing political order of which it is part: in essence, a legal revolution versus a political one (of a certain sort). Accordingly, constitutional revolutions are *not* essentially connected to a political revolution, usually occur without them, and do not necessarily involve any of their characteristic features: mass mobilization, the temporally sharp or abrupt break, and extra-legal or (procedurally) extraordinary modes of change. Indeed, even ordinary formal constitutional change—amendment or authorized replacement—is not required; for example, where brought about by judicial decision.[21]

As the broader concept, instances of revolutionary constitutionalism may include constitutional revolutions but sweep beyond them. So, for example, the American Revolution undoubtedly included fundamental change to the pre-1776 legal/constitutional order, but this would be an insufficient or incomplete description of it. In rejecting and overthrowing through mass mobilization the existing governance regime as tyrannical, it is more fully and accurately understood as a political revolution with constitutionalist goals. Had Charles I or James II of England been persuaded at the outset to sign—and abide by—a parliamentary bill abolishing absolute, in favor of constitutional, monarchy, this would have been a constitutional revolution and the subsequent episodes of revolutionary constitutionalism to bring this (and more) about, leading to their execution/a brief republic and personal/dynastic banishment respectively may well have been unnecessary. If the United Kingdom were now to abolish this constitutional monarchy by statute, following a referendum or electoral mandate, or to create a "written" or codified constitution after a consultation and enactment process lasting a decade, this would amount to a constitutional revolution, a fundamental change in its constitutional order, but not to revolutionary constitutionalism. Recognizing the difference between the two concepts enables us to distinguish between what happened in Canada in 1982 or Israel in 1992 on the one hand,[22] and Tunisia, Egypt, and Libya in 2011 on the other; between the New Deal constitutional revolution and the American Revolution.

As these examples indicate, constitutional revolutions most commonly involve fundamental change *within* constitutionalism, a transition from one constitutionalist paradigm to another, rather than revolutionary constitutionalism's concern in its primary sense with change *to* a constitutionalist order. So a shift from legislative to constitutional supremacy (Canada, Israel), from a unitary to a federal state (Belgium), from constitutional laissez-faire to the regulatory state (New Deal), or from a form of non-liberal constitutionalism to a liberal one or vice-versa, would all likely be instances of a constitutional revolution, reflecting a fundamental change in constitutional paradigm and self-understanding. But as the examples of the Glorious and American Revolutions also suggest, constitutional revolutions may not necessarily be

[21] As with the New Deal constitutional revolution and, arguably, the Israeli. On the latter, *see infra* note 22.

[22] As part of the "repatriation" of the Canadian constitution in 1982, the new Canadian Charter of Rights and Freedoms created a constitutional bill of rights and empowered courts to enforce rights against legislatures for the first time. On the Israeli "constitutional revolution" revolving around the enactment of the first Basic Laws dealing with rights, *see* Gideon Sapir, *Constitutional Revolutions: Israel as a Case-study*, 5 Int'l J. L. in Context 355 (2009).

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limited to change in constitutionalist paradigm. As we have seen, it does not appear to be a misuse of the term to state that the American Revolution against absolutist, arbitrary, or tyrannical power included (although it was more than) a constitutional revolution, nor that this would describe the situation had the ending of absolute monarchy in Great Britain not required revolutionary political transition. The legal transformation from Nazi Germany to the Federal Republic (but probably not from the Weimar Republic to Nazi Germany) is perhaps similarly characterizable as a constitutional revolution, even though it is also clearly an example of non-revolutionary constitutionalism. In this way, although narrower in scope or scale as in essence a fundamental legal transformation, constitutional revolution can also be seen as a broader concept than revolutionary constitutionalism, as it covers more cases and is not limited to scenarios involving political revolutions. All of this appears to be captured in Gary Jacobsohn's very helpful definition of the term: "[A] constitutional revolution can be said to exist when we are confronted with *a paradigmatic displacement, however achieved, in the conceptual prism through which constitutionalism is experienced in a given polity*."[23]

Jacobsohn's definition is designed to emphasize substance, the extent of change, over the process by which it occurs ("however achieved") and also to reject the necessity/centrality of the "sharp break" by acknowledging that some constitutional revolutions are more incremental and take place over a relatively extended time period (for example, the Irish: 1922–1937).[24] On this first point, what is the situation regarding revolutionary constitutionalism? Is it also most essentially about results, or the process by which change occurs?

Here the two versions of revolutionary constitutionalism provide somewhat different answers, but in both of them issues of process are more central than with respect to "constitutional revolutions." As far as the classic version is concerned, revolutionary constitutionalism cannot just be about outcomes—replacing absolutist or authoritarian regimes with a constitutionalist one—but also essentially involves *how* the outcome was brought about, through a revolutionary process. This again, rather than substance, is what distinguishes revolutionary constitutionalism in this primary sense from other, non-revolutionary routes to, or sources of, constitutionalism, such as that "imposed" on the defeated Axis powers after World War II. So, for example, had the Egyptian military simply ousted the Mubarak regime in 2011 and implemented a plausibly constitutionalist one of its own accord without the existence of mass demonstrations, or before they started, we would not think of this as an episode of revolutionary constitutionalism—elite constitutionalism perhaps or a "democratic coup d'état"[25]—however positively we might judge the action. The particular form of mass mobilization is less important, it can include peaceful demonstrations, popular uprisings and cross-cutting political support for the revolutionary movement to begin a negotiated transition of power, as in Poland and South Africa.

[23] Jacobsohn, *supra* note 5, at 3 (emphases in original).

[24] In particular it rejects the centrality/necessity of the Ackermanian "constitutional moment." On this point, *see also* Rivka Weill, *Evolution vs. Revolution: Dueling Models of Dualism*, 54 Am. J. Comp. L. 429 (2006).

[25] Ozan Varol, *The Democratic Coup d'État*, 53 Harv. Int'l L.J. 291 (2012).

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By the same token, although in this way process is essential for revolutionary constitutionalism, it is of course not sufficient. Mass mobilization for constitutionalism by itself, whether through a revolutionary movement or otherwise, does not amount or equate to a constitutionalist revolution; it may get no further than dispersal and harassment by the existing regime's loyal troops, as in Tiananmen Square in 1989. Egypt had all the hallmarks of revolutionary constitutionalism but has so far failed to achieve the revolution's goal of constitutionalism. In short, revolutionary constitutionalism most essentially involves the radical transformation to a constitutionalist political order brought about by means, and as a central goal, of a political revolution. It does not, however, predetermine the specific nature of that constitutionalist order: "transformative," "incrementalist," and "preservative" constitutions are all possible, as are non-liberal forms of constitutionalism.[26]

When we turn to the constitutionalism to revolution variety, the specifics are a little different but the importance of both process and outcomes remains. Here, clearly results are central, the point of the entire exercise is to bring about radical transformation in the basic political principles and orientation of a society beyond the legal/constitutional, and not mere piecemeal reform. In this scenario, the revolution mostly *is* radical structural and substantive change, a change in kind and not simply degree in the way the system operates and for whom, even though the popular support and mobilization must be present for the electoral and constitution-making route to revolution to get off the ground. At the same time, however, for this to be—and remain—a version of constitutionalism at all, how it is achieved must be relevant and there are constraints on the process; i.e., through at least reasonably fair electoral and plausibly constitutionalist means. If and when the revolution moves too far into the terrain of "abusive constitutionalism," and even more into that of pure authoritarianism, then it is no longer an instance of revolutionary constitutionalism.

3. Paradoxes and problems of revolutionary constitutionalism

In its classic or primary form, revolutionary constitutionalism involves a radical transition at T^1 (the political revolution), but once the resulting constitution is in place to institutionalize and give expression to the revolutionary principles of the new order, this new order then resists further radical change at T^2. In this sense, by combining a radical first phase with a more conservative or preservationist future, revolutionary constitutionalism rejects the notion of "permanent revolution."[27]

This resistance to further radical change and the effective declaration of the revolution's end typically takes the two standard legal forms of constitutionalism: (1) entrenchment; i.e., making amendments to the (revolutionary) constitution relatively difficult to enact through some type of supermajority requirement and (2)

[26] *See supra* text accompanying notes 18–19 and *infra* note 85.

[27] Ackerman, *supra* note 6 (characterizing this rejection as a feature of "liberal revolution").

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distinguishing constitutional amendment from replacement, at least implicitly, by referencing only the former and so making no provision for the latter.[28] Some revolutionary constitutions (for example, India) increase the level of resistance still further by adopting the doctrine of unconstitutional constitutional amendments, which provides more express or substantive guidance as to the distinction between amendment and replacement. By distinguishing substantively between permissible subjects of amendment or revision and impermissible changes to the core structural features or revolutionary principles of the constitution, which would amount to replacement, this doctrine announces that there is no authorized or constituted method of rejecting the revolution.

In this way, revolutionary constitutionalism takes the more general "paradox of constitutionalism" explored by Martin Loughlin and Neil Walker in their edited volume—that, quoting Maistre, "the people . . . are a sovereign that cannot exercise sovereignty"[29]—to a new, heightened level. For here the people *do* exercise sovereignty, directly, but once this has occurred the possibility is withdrawn for the future. Revolutionary constitutionalism celebrates revolution as a legitimate, albeit extra-legal or extraordinary, mode of political change at T^1—indeed, as an exercise of the highest political authority in the society—but then de-legitimizes it at T^2. This Janus-like attitude towards revolutionary action is a consequence of it being a form of constitutionalism, which places high value on stability, predictability, and legality, and is perhaps distinctive to it.[30] Non-revolutionary constitutionalism rejects the legitimacy of revolutionary action in the first place, while in principle non-constitutionalist revolutions may be more permanent, subject of course to pragmatic concerns about the leadership's hold on power or legacy.

Apart from the paradox itself, this unleashing and then taming of the revolutionary spirit between T^1 and T^2 creates a serious practical problem that helps to account for the failures of several revolutions, at least as constitutionalist revolutions. This is that, once released, revolutionary force—having typically built up over a long period of time—can be overwhelmingly powerful and difficult to contain. This helps to explain why several revolutions (the original French, February 1917, the Mexican) began with more limited, "liberal" or fully constitutionalist aims and phases but were engulfed by the eventual eruption of more radical and violent forces that had been bubbling up from below during the progress of the revolution.[31] And as the revolution

[28] *But see* Tom Ginsburg, Daniel Lansberg-Rodriguez, & Mila Versteeg, *When to Overthrow your Government: The Right to Resist in the World's Constitutions*, 60 U.C.L.A. L. Rev. 1184 (2013) (demonstrating that some constitutions depart from this "typical" situation by containing "right to resist" provisions—although only a smaller sub-set of these specifically contain provisions dealing with constitutional replacement).

[29] Martin Loughlin & Neil Walker, The Paradox of Constitutionalism 1 (2007). Or, in their own words, "that governmental power ultimately is generated from the 'consent of the people' and that, to be sustained and effective, such power must be divided, constrained, and exercised through distinctive institutional forms." *Id.*

[30] For an insightful, "strong democratic" critique of this feature of revolutionary constitutionalism, *see* Colon-Rios & Hutchinson, *supra* note 5.

[31] *See, e.g.*, William Doyle, The Oxford History of the French Revolution 112–135 (1989). The important, independent role of war—external in the cases of the French and Russian Revolutions, civil war in the case of the Mexican—in affecting the course of a revolution should not be underestimated.

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becomes more radical, or is perceived as such, this in turn swells support for a return to order and some form of counter-revolution or even restoration of the old regime. This liberal-radical-restoration/counter-revolution story can certainly be told of the English revolution/civil war of the mid-seventeenth century and both the 1789 and 1848 French revolutions.

A second, subsidiary paradox is that of the transformative constitution that cannot be transformed. We saw above that revolutionary constitutionalism does not dictate the specific nature of the constitutionalist regime and constitution adopted. It is more about constitutionalism as the goal and result of a revolution, of how it comes about, than the particular content of the end product—even though, within the wide parameters allowed, one can still posit more or less radical constitutions; for example, the unimplemented 1793 French constitution (more) versus that of 1791, or 1799 (less), or the South African versus that of the United States. But where you have a more radical—or transformative—constitution that envisages or mandates further change in society combined with the more radical resistance to constitutional change embodied in "eternity clauses" or the unconstitutional constitutional amendments doctrine, this tension between transformation and continuity inherent in revolutionary constitutionalism achieves its maximum potential. The "formal" solution of distinguishing between the constitution as a tool for, rather than an object of, radical change arguably just restates the tension.[32]

This same tension is also manifested in a common institutional problem of revolutionary constitutionalism. Given the intended continuing operation of the revolutionary constitution well beyond T^2, who are its privileged "guardians" after the revolutionary leadership has passed from the scene?[33] In India, the judicial development of the basic structure doctrine in and after 1973[34] may be seen as a battle between the Congress Party heirs of Nehru and Gandhi on the one hand and the justices of the Supreme Court on the other as to which of them had the primary role of preserving the integrity of the constitution. Because the situation in India combines a relatively easy formal amendment rule of two-thirds of both houses of parliament[35] and what was still at the time a dominant Congress Party, amending the constitution was more or less child's play for the government, thereby threatening the "silent" distinction between amendment and replacement. The Congress Party had been utilizing its amendment powers since the beginning of the constitution to carry out its "transformative mandate" to redistribute land to the poor over the claims of the owners that their fundamental rights—including the right to property—under Part III of the constitution had been violated.[36] By rejecting the government's claim that the constitution gave it substantively unreviewable amendment power, in order to deal

[32] Putting aside for now the additional complexity in India of a transformative constitution that (in certain areas) embraces "constitutional incrementalism." Hannah Lerner, Making Constitutions in Deeply Divided Societies (2011). *See infra* text accompanying note 85.

[33] *See* Ackerman, *supra* note 9.

[34] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

[35] India Const., art. 368.

[36] *See, e.g.*, Madhav Khosla, The Indian Constitution 145–165 (2012).

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with practical problems of transformation as they arose, the Supreme Court declared itself the true guardian of the revolutionary legacy. A similar "battle"—or, more accurately perhaps, a series of skirmishes—has been ongoing in South Africa, between the African National Congress (ANC) government and the Constitutional Court, although it is not yet being waged over the specific issue of the amendment power and its substantive reviewability but more generally about the modalities of transformative constitutionalism within a constitutional democracy. During these skirmishes, ANC leaders have referred to members of the court as "counter-revolutionaries."[37]

Note that the constitutionalism to revolution version of revolutionary constitutionalism partly reverses the radical change/continuity paradox, in that, unlike the classic version, T^1 (electoral triumph, constitution-making) represents the smaller change and T^2 the greater one. Accordingly, further radical change will be facilitated rather than resisted precisely because in this context the revolution mostly follows, rather than precedes, the constitution-making process. Such radical change, and not consolidation and institutionalization, remains the point of the exercise.

4. How revolutionary constitutionalism ends

In essence all political revolutions, including episodes of revolutionary constitutionalism, tend to go through the same three stages. The first is the widespread, cross-cutting, and increasingly visible, loss of authority of the old regime that is the necessary precondition of a revolutionary opportunity.[38] As Hannah Arendt notes, this, rather than conspiracy, is the cause of revolutions.[39] Whether of the colonial or internal variety, this loss of authority typically develops over an extended period of time, although its manifestation and obviousness may be more or less sudden.

The second stage is the revolutionary moment itself, the point at which the old regime loses power in addition to its previously evaporated authority. This loss of power may be immediate and total, as where an authoritarian ruler is driven from office—perhaps killed or exiled—and a power vacuum ensues among all state institutions, but it need not be. Sometimes the ruler is toppled but the "deep state" continues to function, in whole or part, as in Egypt; sometimes the ruler or ruling regime continues in office, at least temporarily, but with significantly diminished power which they are now forced to share with others under new formal or informal terms, as with Louis XI in 1789[40] and F.W. DeKlerk's National Party government in South Africa in the early 1990s. As we have seen, this revolutionary moment can manifest itself in a variety of ways, from popular uprisings both peaceful and violent, to demands by or invitations to the revolutionary movement to begin negotiations leading to a formal transfer of power. The immediate cause of, or spark for, the revolutionary moment

[37] Eusebius McKaiser, *Democracy and Its Malcontents*, N.Y. Times Latitude (March 8, 2012).

[38] *See, e.g.*, Thomas H. Greene, Comparative Revolutionary Movements: Search for Theory and Justice (1990).

[39] Arendt, *supra* note 8, at 260.

[40] This sharing began with the calling of the Estates-General and substantially increased when it rapidly transformed itself into a "sovereign" National Assembly.

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can range from the catastrophic weather and crop failures in France during 1788–1789, to Francisco Madero's "letter from jail" following the fixed presidential election of 1910 in Mexico, and to the self-immolation of Mohamed Bouazizi in Tunis a century later.

The third stage of revolutions, at least if they are successful enough at stage two to reach it, is the establishment of the new regime in replacement of the old. For revolutionary constitutionalism this is also typically the final stage, although it may not be for other types of revolutions, and the end arrives in one of four main ways. Successful constitutionalist revolutions tend to conclude with a constitution that institutionalizes revolutionary principles and brings stability and popular legitimacy to the new regime, thereby completing the cycle of reestablishing governmental authority lost by the old order.[41] This ending is typically the result of a two-step process of first creating an interim regime charged with organizing and overseeing the constitution-making process, and then the permanent regime constituted by this latter process. Examples of such successful constitutionalist revolutions of course include the American, Indian, South African[42] and, so far, the Tunisian. The second potential ending, and first failure of revolutionary constitutionalism, is the establishment of a *new form* of non-constitutionalist rule, as in the French example of Louis Bonaparte after 1848. This scenario is to be distinguished from a non- or counter-constitutionalist revolution ending successfully in the establishment of the intended type of regime, as for example the October Revolution and in Iran after 1979. The third is restoration of the old order, as in England after 1660, most European countries that experienced revolutions in 1848, and Egypt under General el-Sisi since July 2013. The final outcome is the failure of *any* regime to establish (or reestablish) itself following the replacement of the old one, with essentially permanent breakdown, chaos, and contestation, and perhaps civil war. This appears to be the story in Libya so far, although it is certainly questionable how far the toppling of the regime as stage two was internally, as distinct from externally, generated. Clearly, this last scenario may also be, and very often is, an interim one—albeit sometimes prolonged—before any of the other three become permanent, as with the Mexican Revolution/Civil War and following October 1917. Similarly, the attempt to establish the first, "successful" outcome may of course fail at either of the two sub-stages of the process—constitution-making and constituted authority—and eventually result in the second, third, or fourth, as again with Egypt (third).

The constitutionalism to revolution variant of revolutionary constitutionalism begins in the same way, with the existing regime's loss of authority,[43] but the second

[41] Arendt, *supra* note 8; Ackerman, *supra* note 6. As with the generic constitutional revolution, this third stage and successful ending of an episode of revolutionary constitutionalism may take some time, as in Poland, where the new constitution was only enacted in 1997.

[42] The South African experience unusually involved two constitution-making processes: (1) the unelected, cross-party negotiations resulting in the 1993 interim constitution and (2) the elected Constitutional Assembly resulting in the final constitution of 1996.

[43] As in Venezuela and Bolivia, with the breakdown of the old regimes of pacted, two party (Venezuela) and coalition-based (Bolivia) "partyarchy" in the face of corruption scandals and economic crises.

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stage consists in the electoral triumph of the new "revolutionary government," followed by a third stage of constitution-making and, finally, the radical transformation which the new constitution, together with continuing mass support—as exemplified in constituent assembly and final elections—makes possible. This variant obviously requires that the preexisting regime includes a system of reasonably free and fair elections, which explains its relative newness and limits its applicability, and perhaps also is more likely to involve a lesser loss of governmental authority, so that the moment at stage two is ripe for electoral transformation but not yet for immediate revolution.

The range of endings is also similar, with two additional possibilities. First, the revolutionary government learns pragmatism in office and evolves to espouse reform rather than revolution. Second, the revolutionary government transforms *itself* into a new form of authoritarian or non-constitutionalist rule. This is the "abusive constitutionalism" scenario, which may or may not coincide with success in achieving the goal of revolutionary social, political and/or economic transformation. For example, however one views the Chávez regime in Venezuela from the perspective of constitutionalism—revolutionary, socialist, abusive, and/or authoritarian—it unquestionably redistributed resources to, and raised the standard of living of, the poorest members of society to a significant degree, at least prior to the collapse of world oil prices. The *CIA World Factbook* for Venezuela reports that the country's Gini index measure of family income inequality dropped from 0.495 in 1998 to 0.390 in 2011, and the percentage of the population living in poverty from 50 in 1999 to 32 in 2011.[44]

5. Constitution-making in revolutionary constitutionalism

Revolutionary constitutionalism is one scenario in which constitution-making takes place, and, as noted at the outset, a significant and visible one in recent years. Are there any distinctive features or challenges of constitution-making in the revolutionary context as compared with the other scenarios, or is the particular occasion for constitution-making relatively unimportant once the process begins? Does its constitutionalist nature and goal impact constitution-making in a way that differs from other types of political revolution? At least two such features of the revolutionary scenario seem highly relevant. First, constitution-making typically takes place in a context of political limbo and fragility, during the period in between the second and third stages when the new regime needs to reestablish political authority following loss of power by the old. In other words, the revolutionary context is not merely once- but twice-removed from ordinary politics. Second, the revolutionary principles or demands at T^1 will likely act as a significant form of substantive "upstream constraint"[45] on possible outcomes at T^2, otherwise the constitution-makers may face accusations of betraying the revolution or acting as counterrevolutionaries. Although the general parameters

[44] CIA World Factbook, *Venezuela*, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/ve.html.

[45] Jon Elster, *The Forces and Mechanisms in the Constitution-Making Process*, 45 Duke L.J. 364, 365 (1995) (constraints imposed in advance by the caller of the constituent assembly).

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of possible constitutionalist outcomes may be flexible, typically any particular revolution will be made with certain fairly specific principles or demands in mind, as either conceived in advance by the revolutionary movement or forged in the context of the spark that lit the uprising. In terms of the impact of the constitutionalist goal on constitution-making as compared with other types of political revolution, it is likely that more intrinsic value will be attached to the enterprise, as the culmination of the revolution. Of course, this difference hardly guarantees success.

5.1. The (relative) importance of constitution-making in the revolutionary context

The constitution-making process has been described generally as a key moment in shaping the character of any new regime.[46] But in the specific context of revolutionary constitutionalism, what is its relative role and importance for the overall success or failure of that new regime and the revolution that brought it to power as compared with broader social and political factors? In the larger scheme of things, is constitution-making necessarily or always the critical variable? Is it simply a conceit of constitutional lawyers to believe that success turns significantly or mainly on the process, content and quality of the finalized document, or the priority that is attached to producing it?

Any general relationship between constitution-making process, finished product and political outcomes is obviously a highly complex one.[47] In the context of revolutionary constitutionalism in particular, the role of constitutional versus other factors in shaping or determining outcomes is especially challenging to identify because of the attendant political limbo, flux, and scale of upheaval. Nonetheless, it seems incontestable that a range of broader political, economic, social and cultural variables can critically affect the likelihood of a successful constitutionalist revolution once the third and final stage is reached.[48]

For example, of the two main scenarios in which revolutionary constitutionalism occurs in its classic or primary sense, colonial revolutions are more likely to succeed than internal revolutionary regime changes. This is so for reasonably clear reasons. The "opposition," the old regime, is not only toppled but largely leaves the scene and is no longer significantly present or represented to pursue its interests in the making of the new one. Relatedly, a country is typically more united around the goal of independence than internal regime change, where the relevant interests are likely to be more

[46] David Landau, *The Importance of Constitution-Making*, 89 Denver U. L. Rev. 1, 6 (2012) (at least in cases where "no one faction has clear control in the new regime.").

[47] *See* Tom Ginsburg, Zachary Elkins, & Justin Blount, *Does the Process of Constitution-Making Matter?*, 5 Ann. Rev. L. & Soc. Sci. 201 (2009).

[48] Although this will be obvious from what follows, it is worth pointing out and acknowledging the methodological limitations of my analysis throughout this part of the article. Its aim is mostly programmatic, to suggest possible hypotheses for future research, and does not purport to demonstrate any of its claims, including the variables that contribute towards the success or failure of episodes of revolutionary constitutionalism, in a rigorous social scientific manner. The case studies I discuss were mostly selected as the major or best-known recent examples of revolutionary constitutionalism.

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divided: between rich and poor, town and country, the religious and secular, insiders and outsiders, etc. To be sure, after independence, once the colonial power has withdrawn, divisions will often emerge in the course of reconstruction that were dormant or muted while the common goal remained, but that experience of original unity can nonetheless be a valuable resource in events that follow.

Similarly, the extent to which an episode of revolutionary constitutionalism results in a complete power vacuum after the second stage seems to be another factor in the likelihood of success or failure, although there may be a fairly small "sweet spot" here in terms of success. Thus, an explanation that Arendt provides for the different outcomes of the American and French revolutions is that the former overthrew only the top (i.e., royal) layer of the structures of governance in the country, but largely left the lower (local) levels in place to maintain order and organize the interim forms of government, whereas at least after the execution of Louis XI in 1792, the system of government collapsed, taking with it all existing sources of political authority and effectively returning France to the state of nature and "pre-political natural violence."[49] Whether or not this accurately describes or persuasively explains these two cases, this factor does seem relevant to understanding more recent ones. The Libyan revolution has resulted in the dismantling of the (weakly institutionalized) state and an almost total authority vacuum. By contrast, in both Tunisia and Egypt, the falls of Ben Ali and Mubarak did not have such an effect, significant parts of the more strongly instititutionalized states continued to function leaving greater scope for successful transition, although, it has been suggested, *too much* in the case of Egypt, as the "deep state" quickly reasserted control of the revolution and ultimately eradicated it.

Other key non-constitutional factors that appear to help explain the three different outcomes so far of revolutionary constitutionalism in Tunisia (an elected government operating under the new, post-revolutionary constitution), Egypt (a successful coup against the elected government that was operating under the new constitution), and Libya (civil war and no progress towards a new constitution) are the respective roles of the military, the degree of polarization in the country, the existence and control of valuable natural resources, and perhaps external intervention. Thus, whereas the Tunisian army stayed largely on the sidelines while first the interim and then the elected politicians took control of the constitution-making process, the powerful military in Egypt, with massive economic interests of its own to protect, took firm control of the revolution after convincing Mubarak that he had no choice but to resign. The Supreme Council of the Armed Forces (SCAF) appointed itself the interim government, drafted the initial series of constitutional amendments that was put to a referendum in March 2011, and determined (after consultation) the order in which regular elections and the constitution-making process would occur. Even once elections were held for the civilian government, the military remained a constant factor and power player. By contrast, Libya had no institutionalized military but rather a series of rival militias. These reflect the greater polarization of political forces in a

[49] Arendt, *supra* note 8, at 180–181.

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territory deeply divided along ethnic, clan, and geographical lines.[50] Among the three, politics is and was least polarized in Tunisia, with a similarly mostly ethnically and religiously homogeneous population as Egypt but a more moderate and accommodationist Islamist movement (and lacking the even more fundamentalist Salafis to the "right" of the Muslim Brotherhood), and larger and somewhat better institutionalized and organized liberal/secular parties. Another critical geopolitical factor is that Egypt and Tunisia have no natural resources to rival Libya's vast oil reserves, the control of which appears to be *the* major source of rivalry and conflict among the various militias that have effectively divided the country into two. Finally, there are some indications that the size, importance and historical centrality of Egypt in the Sunni Muslim world compared to the relative marginality of Tunisia has resulted in greater external (i.e., Saudi, perhaps even US) involvement and support for the forces or order and stability (counter-revolution?) in the former.[51]

One other important political variable that distinguishes the South African—as well as the Venezuelan and Bolivian—situation from those in Egypt, Tunisia, and Libya is the difference between a mostly leaderless revolution and one that is controlled by a revolutionary movement, and especially a popular, charismatic revolutionary leader. For the historical record strongly suggests that this is a key factor in the success or failure of political revolutions of all types. Notable failures range from the leaderless French and February 1917 Russian revolutions to Libya and Egypt, while successes include the American, Indian, Polish, South African—all with popular, charismatic leaders—as well as the non-constitutionalist revolutions led by Lenin, Mao, Castro, and Ayatollah Khomeini. Again, however one evaluates the ultimate achievements of the revolutionary movements and governments in Venezuela and Bolivia, the role of Chávez and Evo Morales as leaders (who arose from the lower classes of society) was crucial.

If these are some of the important non-constitutional factors that help to determine the outcomes of revolutionary constitutionalism, is there anything beyond the almost definitional point that successful constitutionalist revolutions tend to end in a constitution that speaks to the practical importance and priority of constitution-making in the revolutionary scenario?[52] Is there anything more substantive? *Is the constitution more cause or effect of success?*

One more substantive reason that constitution-making may be important after the revolution occurs is that it can serve as an independent source of legitimacy for the new regime. As we have seen, revolutions begin only once the old regime has lost the authority to govern, and the new regime, if it is to succeed, must not only replace the old one in power but also in authority, by establishing its own and reestablishing that of government generally. Where the new regime lacks or loses legitimacy, this creates the conditions for continued struggle and potential overthrow, as with the military

[50] Ester Cross & Jason Sorens, *Arab Spring Constitution-Making: Polarization and State Building* (Nov. 3, 2014), *available at* http://ssrn.com/abstract=2518648.

[51] James Defronzo, Revolutions and Revolutionary Movements 446–447 (5th ed., 2015).

[52] I say "almost definitional" and "tend" to end here because just as, conceptually, constitutionalism does not require a codified constitution, neither does revolutionary constitutionalism.

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coup in Egypt in July 2013. Despite the power of the military, the success of the coup was only possible because by this point legitimacy had drained out of the Morsi regime.

So how can the new regime achieve this, what are the sources of such legitimacy? In the general revolutionary context, there are broadly-speaking three. The first is that the revolutionary movement and leader(ship) have built up and acquired legitimacy as a result of their long struggle and sacrifice on behalf of the people to be rid of the old regime.[53] Where and when it takes over power in the name of the people, this legitimacy carries over into the new regime. This is one reason that such revolutions tend to be more successful than the leaderless variety. George Washington brought his legitimacy, acquired during the revolutionary war, to the new office of President of the United States rather than the other way around, as with at least all post-revolutionary generation presidents. This is why it was so important that he was persuaded to accept the position. Similarly, in India this source of legitimacy lasted for the rest of Nehru's life and continued for the Congress Party for more than another decade after his death.[54] The Solidarity movement in Poland and its leader Lech Walesa were the recipients of this legitimacy in and after 1989. In South Africa, it applied to Nelson Mandela and his generation of anti-apartheid activists, and remains for now the basis of the ANC's political dominance.

A second source of legitimacy derives from performance: delivering what the people most want. The vast majority of revolutions start with popular demands for democracy (including independence/self-government) and/or bread (i.e., better economic futures). Where these are plausibly satisfied, this brings its own distinct legitimacy to those responsible for the result, whether a revolutionary movement or otherwise. Sometimes, where the revolution appears to be either losing direction or gaining momentum, and especially where this is manifested by increased levels of violence, chaos, and breakdown of order, a new popular desire for stability may emerge and begin to replace the yearnings for democracy. This is the story of several "Thermidors" and Napoleons,[55] and numerous counter-revolutions and new forms of authoritarian rule. In this situation, providing the people—or enough of them—with order, stability and the reality or imminent prospect of increased living standards may be sufficient to bestow legitimacy and authority on the new regime, at least while these "goods" last. Certainly in Egypt, this appears to be the actual/only source of legitimacy for the el-Sisi regime, such as it is, and not the charade of the 98.1 percent vote in favor of its 2014 Constitution achieved with a 38.6 percent turnout. Given the country's recent revolutionary experience, this appears to be a notably fragile basis; the returns on bringing back stability and order, at least in authoritarian form, may prove to be short-term ones.

But a third source of legitimacy, and one that is especially relevant for a constitutionalist revolution, is the process and content of constitution-making. Where the

[53] Ackerman, *supra* note 5.

[54] Nehru was prime minister of India from independence in 1947 until his death in 1964.

[55] The ninth of Thermidor in the new revolutionary calendar was the date of Robespierre's fall and effectively of the end of the reign of terror.

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new regime's claim to authority rests, in whole or in part, on a constitution-making process that is viewed by a broad cross-section of the people and relevant factions to have been fair and inclusive, and a resulting document that reasonably incorporates the broad goals, principles and aspirations of the revolution, then, *ceteris paribus*, it is more likely that this claim will be accepted and the new regime treated as legitimate. Sometimes this distinct source of legitimacy will be super-imposed on one or both of the other two, as for example in India and South Africa. Sometimes it will be missing, but not essential in light of the others, as arguably in Poland in and after 1989, where the revolutionary movement and leader came to power and gave the people what they most wanted (independence, democratic elections, movement towards a market economy), but without engaging in the process of constitution-making—as distinct from selective amendment by the legislature—for several years.[56] But sometimes, especially where the other sources are lacking, this third one will be critical.

Tunisia seems to be an example of this in that, in the context of a mostly leaderless revolution, a major source of legitimacy for the current unity government appears to be the widespread sense that it is the product of a largely successful experience of constitution-making. The process of constitution drafting by the National Constituent Assembly, directly elected by universal suffrage and proportional representation, was viewed favorably and as appropriate by most from the outset, and this carried over to the final document produced, even though its adoption did not require a popular referendum.[57] By contrast, the Morsi regime lacked, and the current internationally recognized government in Libya lacks, all three sources of legitimacy. They were largely leaderless revolutions that failed to provide the affirmative "goods" the people revolted for. In the case of Egypt, both the process and product of the constitution-making experience after the revolution were seen at the time as deeply flawed and perceived as such by large sections of the population. Thus, the circumstances surrounding the first and second constituent assemblies appointed by the parliament in Egypt, with claims of partisan packing on the part of the Muslim Brotherhood, walk-outs by liberal-secular members, as well as actual and threatened court disbanding,[58] virtually guaranteed that the eventual document would be treated as illegitimate by broad sections of the political spectrum and population whatever its content and whatever the result of the popular referendum (64 percent in favor on a low, 33 percent turnout).[59] In Libya the constitution-making process seems to be in disarray and stalled for the foreseeable future.

Accordingly, in addition to signaling the end of the transitional period and the normalization of the new regime, as well as serving the essential "choice of rules"

[56] The Communist-era constitution of 1952 was replaced by a new one in 1997. Prior to that, the 1952 constitution was amended in what became known as "the small constitution."

[57] The ratification process required, and received, a two-thirds vote of the constituent assembly.

[58] The Supreme Constitutional Court disbanded the first constituent assembly in April 2012.

[59] Egypt and Tunisia (as well as South Africa) therefore appear to be interesting counterexamples to a view in the literature that approval of a draft constitution by popular referendum results in higher levels of legitimacy and public support for it. *See* Ginsburg et al., *supra* note 47, ¶¶ 5.17–5.18 (summarizing and evaluating this scholarship).

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function in a polity, a more substantive benefit of the constitution-making experience—both process and content—may be to help establish or bolster the authority of the revolutionary government. Although potentially true in the case of any type of political revolution, it is likely to be an especially important or key source of legitimacy in a constitutionalist revolution.

5.2. What contributes to successful constitution-making in the revolutionary constitutionalist context?

To the extent that constitution-making can play an important role in the ultimate outcome of episodes of revolutionary constitutionalism, for the reasons just discussed or others, what contributes to its success? What features of its process and substance seem to be most critical?

(a) Process

Starting with process, one fairly clear lesson of the recent episodes is the importance of ensuring that as many of the leading political groups and factions as possible feel a commitment to, and sense of investment in, a joint or common enterprise. Where there is a revolutionary movement with broad, cross-cutting popular support transcending mere organizational superiority, this involvement of all groups may be highly desirable, as helping to reduce resistance and avoid significant bloodshed (compare South Africa with the Muslim League's boycott of the Indian constituent assembly), but it is perhaps not critical to the ultimate success of the process. But in the context of a mostly leaderless revolution without such a genuinely dominant movement, ensuring that all major groups are invested in the constitution-making process and preventing any one of them from exploiting temporary/organizational primacy to take control of it, is especially important.[60] The composition and structure of both the constitution-drafting body and the interim government should be determined with this priority in mind. Absent such a temporarily ascendant group, a proportionally elected constituent assembly and a roughly parliamentary form of interim government, as in Tunisia, will generally be consistent with this priority by resulting in some form of de facto power-sharing. But where such a group exists, as it turned out in Egypt following the toppling of Mubarak, the situation is more difficult in this respect—especially of course where a strong army with a history of intervention is carefully monitoring developments. Here, more formal power-sharing arrangements for both the interim government and constituent assembly to ensure the full involvement of as many constituencies as possible may be necessary. In short, taking the political context into account is critical.

A comparison of the Egyptian with the South African and Tunisian cases also suggests that timing and sequencing in revolutionary constitution-making processes can be a significant factor. The latter examples involved the usual two-stage

[60] Here, under this particular scenario of revolutionary constitutionalism, I agree with the more general prescription of David Landau, *see supra* note 46.

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process of an interim regime that constitutes the rules for its successor followed by a final regime that is constituted by them, although the South African version involved the unusual phenomenon of two different constitution-making processes: an interim one arrived at essentially by elite pact and the final one by the elected Constitutional Assembly. Apart from the more orderly/logical sequence of determining the framework before operating under it, this more standard arrangement limits the incentives for individual or institutional self-dealing by operating under some form of a veil of ignorance as to who may occupy which position in the new regime. Admittedly, this factor is mostly formal in the case of the revolutionary leader—the George Washington, Nehru, Mandela—who will almost certainly fill whatever new permanent top office is created. In the case of Egypt, the perhaps well-meaning but ill-fated decision to hold regular presidential and parliamentary elections (i.e., not interim, but carrying full terms) prior to the commencement of the constitution-drafting and ratification processes, in the hope that this would more quickly prise control of events out of the hands of the military, appeared to maximize the incentives and opportunities for self-dealing and destroy any veil of ignorance, adding to the sense of illegitimacy surrounding the task. The constituent assembly was, for example, debating what President Morsi's powers would be for the next four years, and not those of a future, unknown office holder.[61] Perhaps unfairly, at least in appearance, this had the effect of transforming the revolutionary nature of the process into the regional norm of top-down, executive-granted constitutions. The standard interim/final sequencing also seems more likely to result in the combination of institutionalizing revolutionary principle and building-in the compromise and protections that cross-cutting support for a stable new framework requires—before the polarizing tendencies of normal party politics take center stage. Unlike the common abusive variety, revolutionary constitutionalism does not start from ordinary politics; but, if successful, ends with it.

By contrast, a second time-related issue seems less important in the revolutionary context. This is imposing deadlines on the constitution-making process, which has been argued in the general literature to be crucial for maintaining the sense of urgency necessary to reach an agreement. "If people find themselves with all the time they need to find a good solution, no solution at all may emerge."[62] The Egyptian constitution-making process was given a six month time limit,[63] the South African two years, and the Tunisian did not have any limit per se and ended up taking three years—as, incidentally, was also true of the Indian (in both respects).[64] This is, perhaps, because the political limbo and authority vacuum of the revolutionary scenario creates its own sense of urgency.

[61] Of course, this was made more jarring by the fact that its members were appointed by a parliament dominated by the Muslim Brotherhood, of which, by the nature of his office, Morsi was effectively party leader.

[62] Elster, *supra* note 45, at 394–395.

[63] President Morsi subsequently extended this by two months, although in the end the additional time was not used.

[64] In India, the Constituent Assembly perceived itself as fully sovereign only after partition—and independence. *See* Lerner, *supra* note 32, at 132–133.

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The third process-related issue is whether, in the specifically revolutionary context, the nature of the constitution-drafting forum (general legislature versus specialized constituent assembly) matters more or less than its composition and/or whether it is "sovereign" or constrained in its output.[65] One expressed concern in the general literature about legislatures doubling up as constitution-drafters is, again, institutional self-dealing and the likelihood of stronger legislative powers in the finished document, although Ginsburg et al. find no empirical basis for this hypothesis.[66] In South Africa under the 1993 interim constitution, the first democratically elected parliament served as both constitution-drafter and general legislature; in Tunisia, as the only elected body, the constituent assembly also functioned as the interim legislature in a de facto parliamentary system, appointing the interim president and prime minister, the latter of whom was politically responsible to it. Only in Egypt was the constituent assembly a separate and specialized constitution-drafting body, operating concurrently with the newly elected regular parliament. Even though the latter was shut down by the Supreme Constitutional Court for most of the six-month constitution-drafting process,[67] the constituent assembly did not take up any of its ordinary functions so that during this time President Morsi effectively governed without a legislature. Again, given their respective outcomes, these bare facts do not appear to support the superiority of the specialized tribunal thesis in the revolutionary context.

As to whether the Egyptian specialized assembly engaged in less institutional self-dealing, this is complicated by several threshold issues, in addition to the general difficulty of measuring and comparing legislative power. These include: (1) the accusations of partisan (rather than institutional) self-dealing, given appointment by the Muslim Brotherhood-dominated parliament; (2) the well-known path dependence on original choice of presidential versus parliamentary form of government; and (3) whether adopting a parliamentary system where there is a clearly dominant political party (the ANC) bestows greater or lesser power on the legislature than a semi-presidential system where there is not. Within the two semi-presidential constitutions without a genuinely dominant party, namely the 2012 Egyptian and 2014 Tunisian, it is far from clear that the dual-function Tunisian constituent assembly engaged in greater self-dealing. While the resulting Tunisian parliament has greater power in the ordinary legislative process in that the presidential power to veto legislation is more limited,[68] it has less power than the Egyptian parliament had in dismissing the government (a "constructive" versus a merely negative vote of no confidence is required) and also as lawmaker, given the greater scope of the executive's authority to issue decrees.[69]

[65] For (mostly) contrasting positions on this issue, *compare* Elster, *supra* note 45 and David Landau, *Constitution-Making Gone Wrong*, 64 Al. L. Rev. 923 (2013).

[66] Ginsburg et al., *supra* note 47, ¶ 5.13.

[67] In June 2012, the Court dissolved the legislature as unlawfully constituted on the basis that election officials had permitted political parties to compete for the one-third of seats designated for independents in the military's transitional charter.

[68] In Tunisia, the legislature can override a presidential veto by an absolute majority of its members, whereas the 2102 Egyptian constitution required a two-thirds override.

[69] In Egypt, this power was limited to times when the parliament was dissolved; in Tunisia, the prime minister may issue decrees in certain ordinary circumstances.

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Seemingly more important than the nature of the forum in these three cases was

(1) whether the constitution-drafting body was significantly constrained in its choices, and
(2) whether the process was dominated by a single group.

In South Africa, notwithstanding the political dominance of the ANC, as reflected in the composition of the Constitutional Assembly elected by PR in 1994,[70] the process was significantly constrained "upstream" by the inclusion in the interim constitution of the 34 "constitutional principles" negotiated between the ANC and the National Party that the final constitution was required to respect, as certified by the new constitutional court. In Tunisia, there were no such constraints, but although the Islamist Ennahda party emerged from the constituent assembly elections as the largest party, it had only 37 percent of the seats and entered into a coalition with the main liberal-secular parties to form and run the interim government. Of the three, only in Egypt was there both domination by one political group/faction and no significant internal constraint on the process: the constituent assembly strongly asserted its "sovereignty."

This unconstrained domination of the process predictably translated into constitutional outcomes. The 2012 constitution significantly reflected the substantive constitutional positions of the Muslim Brotherhood[71] and also enhanced its strategic political interests.[72] The same was true of the military-dominated process that resulted in el-Sisi's 2014 constitution, which negated most of the Islamist-influenced provisions of 2012 and enhanced the formal powers of the armed forces. By contrast, in Tunisia the final document was more moderate and accommodationist, containing no Sharia clause, more conventional rights provisions, and elaborate checks and balances in its semi-presidential form of government. In South Africa, the final constitution was certified by the constitutional court, after one required a series of amendments, as conforming with the pre-approved constitutional principles.[73]

Finally, on procedural issues, under what circumstances, if any, is it ever justifiable or advisable for members of a revolutionary constitution-making body to be appointed rather than elected? If elected, proportional representation seems the preferable method, especially in the leaderless revolution scenario, both to maximize the

[70] The ANC had 252/400 seats in the National Assembly.

[71] For example, Al Azhar was to be consulted on matters of Islamic law that serve as the primary source of legislation; there was no provision on gender equality; only adherents of Abrahamic religions had the right to religious liberty.

[72] For example, by limiting the review powers of the Supreme Constitutional Court and reducing its size to get rid of the most anti-Brotherhood justices.

[73] In India, although the Muslim League boycott meant that the Congress Party dominated the Constituent Assembly, which perceived itself as "sovereign" and unconstrained only after the partition and independence, the long-standing pluralism within the party, as well as the deep regional, ethnic, religious and linguistic divisions in the country, acted as constraints on the outcome and required an "incremental" approach to certain constitutional issues. *See* Lerner, *supra* note 32, ch. 4. In Venezuela, it seems clear that the dominance of Chávez's movement in the constituent assembly of 1999, combined with its unconstrained, sovereign status, deeply affected the resulting constitution's content. *See* Landau, *supra* note 65, at 941–949.

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inclusion of constituencies and because the standard "effective governance" argument for plurality election systems is largely irrelevant in this context.[74] Although for the obvious reason that constitutionalist revolutions include demands for greater democracy, constitution-making bodies have almost always been elected, starting with the French in 1789,[75] in fact the very first modern one, and one of the paradigmatically successful ones—the federal convention in the United States—was not elected but appointed, by state legislatures. Although its legitimacy did not suffer as a consequence, mostly because it comprised leading members of the revolution in person, this was also in part because it was initially envisaged as a constitution amending rather than making body. By contrast, the appointment (by parliament) rather than election of members of Egypt's constituent assembly in March 2012 was, as mentioned, a significant factor in its perceived lack of legitimacy. That said, the imperative of inclusiveness, especially in the "leaderless" revolution scenario, may sometimes call for appointment and not election as a second-best solution, given the immediate political context. Had the Egyptian constituent assembly been elected, it would almost certainly have returned the same lopsided results as the recent parliamentary election. The problem with the first (and only to a slightly lesser extent, the second) constituent assembly was less that it was appointed than the partisan nature of the appointments.

(b) Substance

Turning from the process of constitution-making to its content, obviously (a) there are many substantive possibilities consistent with the overall goal of a constitutionalist revolution, and (b) within this goal, the revolutionary principles to be constitutionalized will differ depending on the nature of the particular revolution. Thus, in South Africa, the central revolutionary principle was racial equality; in Poland, it was liberalism and anti-communism; in the so-called Arab Spring, it was a "clean break" from the history of authoritarian, top-down executive rule. This inevitable breadth and variation underscores what is perhaps the most important general lesson about constitutional content that emerges from the recent episodes of revolutionary constitutionalism: the importance of taking political context into account (once again). Although usually true of any political change, this is especially critical given the distinctive political limbo, authority gap, and fragility involved. Too often, constitutional designers present their preferred options as a one-size-fits-all solution, while "anti-designers" of various types reject *any* institutional approach as misguided in the face of the particular socio-political features of the case in hand.[76] But rather than this design/institutions or socio-political culture binary, a more helpful and pragmatic

[74] "Largely" because it may play a role where the constituent assembly also performs some governance role. It is more complicated as to whether in the constitutionalism to revolution scenario, PR ought to be the norm. In Venezuela, the non-PR electoral system gave Chávez's party 95% of the seats with 60% of the votes. *See* Landau, *supra* note 46.

[75] Although of course it was not clear at the very outset that the Estates General would transform itself into a constituent assembly.

[76] On "success" in constitutional design, *see* Ran Hirschl, *The "Design Sciences" and Constitutional "Success"*, 87 Texas L. Rev. 1349 (2009).

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approach to constitutional content in the revolutionary context may well be institutions in socio-political context. What this means is that the various, but limited range of, institutional and constitutional options—vertical and horizontal separation of powers; form of central government; existence, form and content of a bill of rights; electoral systems; courts; independent commissions, etc.—must be considered and evaluated in light of local political conditions, taking them into account and anticipating the major stresses that the specific revolutionary constitution is likely to face.

Constitutions are not written, and the institutions they establish do not operate, in a political vacuum. This is especially true in the revolutionary context. The occupational hazard of constitutional lawyers is to sometimes act as if they are and do. Interestingly, one area in which this is less evident is the realm of federalism, recently widely employed as a mechanism for diffusing power vertically between center and regions in the context of political societies deeply divided by ethnic, racial and/or religious strife.[77] Here, proffered constitutional solutions tend to be intensely tied to the particularities of context and the relative strengths of political factions and parties. Few offer abstract or universal institutional remedies. In terms of broadening this insight and practice to other institutional variables, at the most basic level constitutional content should reflect whether or not there is a clear dominant revolutionary movement with large reserves of political legitimacy, for this tends to determine the particular set of challenges and pressures that constitutionalism faces. Where there is, as in post-revolutionary India, Poland, and South Africa, it is prudent for constitutional drafters not to rely on party competition and contestation as a major source of checking and dispersing political power, as they can and should in other contexts,[78] but rather on non-party means. These may include a robust bill of rights, federalism, independent courts, electoral commissions, and prosecutors, as well as significant supermajority rules for constitutional amendment and a PR electoral system.

Where there is not a dominant revolutionary movement, as in Egypt and Tunisia, the focus should also be on preventing any temporarily ascendant party from taking advantage of "organizational asymmetries"[79] to gain full, undivided control of the revolution and levers of power, not only during the constitution-making process but after, and on instituting forms of consensual politics and power-sharing while the party system and norms of democratic contestation—suppressed under the old authoritarian regime—mature and develop. Depending on political conditions, this imperative of avoiding a premature winner-take-all system might include instituting constrained parliamentarism with PR or a version of semi-presidentialism with greater divisions of power between both president and prime minister, and executive and legislature.

As an example of the interplay between constitutional design and political context, consider the operation of a broadly similar version of semi-presidentialism in

[77] For a helpful overview, *see* Sujit Choudhry & Nathan Hume, *Federalism, Devolution and Secession: From Classical to Post-Conflict Federalism*, *in* Comparative Constitutional Law, *supra* note 5, 356.

[78] *See* Stephen Gardbaum, *Political Parties, Voting Systems and the Separation of Powers*, 65(3) Am. J. Comp. L. (forthcoming 2017).

[79] *See* Landau, *supra* note 65, at 975.

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Egypt and Tunisia. Semi-presidentialism is currently a highly popular form of government, particularly among new and transitional democracies with recent authoritarian pasts. This is because it holds out the promise of dividing and checking executive authority while also avoiding the risk of unstable parliamentary politics, especially in systems without mature, institutionalized parties.[80] Yet, however well-crafted, the realization of this promise depends significantly on party and electoral politics. Egypt's reasonably elaborate and artfully drawn semi-presidential constitution of December 2012 was undermined in this regard by the unequal condition of the political groupings in terms of institutionalization and preparedness, and the electoral returns that almost inevitably followed from them. The non-competitiveness of the multiple small and divided liberal-secular parties compared to the two Islamist ones in the legislative elections of November 2011–January 2012, compounded by the mixed majoritarian and PR electoral system in place,[81] meant that despite only a narrow presidential election victory, as head of a unified or consolidated majority government of the Muslim Brotherhood, President Morsi was not required to—and did not—engage in any real form of power-sharing: either interparty, between Islamists and liberal-secularists, or intraparty, among the various offices and branches.[82] This perceived partisanship and failure to reach out to opponents rapidly detracted from any cross-party sense of engagement in a common enterprise. In addition, the inherent inflexibility of the presidential office, or lack of a temporal power-sharing possibility, meant that he was legally and politically unchallengeable in office for the full four-year term regardless of mounting opposition and dwindling popularity, which increased the likelihood of the ultimate military coup. Accordingly, design options that take this into account and reduce the possibility of such concentration, including shorter terms, recall, legislative no-confidence votes, and formal power-sharing among all the pro-revolutionary factions and constituencies, might be called for in this situation.

By contrast, the different balance of party politics and sentiment in Tunisia—including the absence of both a clear Islamist majority party and ineradicable cross-party hostility and suspicion, itself partly a result of the different experiences during the interim regime and constitution-making processes—may enable the well-designed, but broadly similar semi-presidential constitution of January 2014 to work more successfully there. Following the period of power-sharing between Ennahda, which held a plurality of seats, and two of the then-leading secular parties after the constituent assembly election in 2011, the legislative elections of October 2014 under the new constitution gave the newly formed main secular party bloc (Nidaa Tounes or "Call of

[80] *See, e.g.*, Sujit Choudhry & Richard Stacey, *Semi-Presidentialism as a Form of Government: Lessons from Tunisia*, Center for Constitutional Transitions Working Paper No. 2, June 2013.

[81] Two-thirds of the seats were allocated on a party-list PR basis; one-third on a majoritarian, constituency basis.

[82] In the sense that the concentration of power in a president is greatest under the "consolidated majority" scenario. *See* Cindy Skach, *The "Newest" Separation of Powers: Semi-Presidentialism*, 5 Int'l J. Const. L. 93 (2007). This unity and concentrated power was undoubtedly augmented by the army's closure of the parliament under Supreme Constitutional Court order, meaning that de facto Egypt reverted to fully presidential, one branch government.

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Tunisia") eighty-six out of the two hundred and seventeen seats and Ennahda sixty-nine.[83] The result was the formation of a new unity government, but one that involves a significant inter-party transfer of power compared to the previous one.[84]

Similarly, as Hannah Lerner points out, the choice between an incrementalist and a transformational approach to constitutional content may very much depend on the local political context.[85] So where a particular issue is the subject of deep, "existential" disagreement along the very lines that divide a deeply divided political society, as for example the issue of national language and family law in India, or arguably the Islamist–secularist divide in Egypt and Tunisia, an approach that effectively postpones any final resolution may be the pragmatically better one—especially where it threatens to undermine the stability and authority of the new regime over an issue that was not central to the revolution itself. Here, the 2012 Egyptian constitution's provisions on the role of Sharia (and Al-Azhar) may be contrasted with the Tunisian constitution's more ambiguous ones, the interpretation of which will be deferred to a yet-to-be-established constitutional court.[86]

6. Conclusion

Revolutionary constitutionalism is a helpful, albeit neglected, category in comparative constitutional law. This is so for two reasons. First, it encompasses a perennially and currently important range of empirical situations that implicate constitutionalism in a distinctive way—through a connection with an underlying political revolution—and have their own particular commonalities, challenges, tendencies, and distortions which merit specialized focus and research. Second, as a concept, revolutionary constitutionalism is distinct from the neighboring term "constitutional revolution," even though there is some overlap between them in that episodes of the former can also include instances of the latter. The primary meaning of revolutionary constitutionalism is the transition *to* constitutionalism by means of a political revolution; whereas the core meaning of constitutional revolution is radical transition *within* a constitutionalist legal order.

[83] In January 2016, Ennahda became the largest party in parliament once again following the resignation of 28 Nidaa Tounes MPs after the appointment of President Essebsi's son as the new secretary general of Nidaa Tounes.

[84] Of the 42 members of the new government (28 ministers and 14 secretaries of state), Ennahda has one minister and three secretaries. Previously, it had been the dominant partner among the three party coalition in the first interim government; whereas the second had consisted of independent technicians.

[85] Lerner, *supra* note 32, ch. 5.

[86] The 2012 Egyptian Constitution maintained the preexisting clause making Islam the main source of legislation; it added clauses requiring Al-Azhar, the chief center of Sunni Islamic learning, to be consulted on matters of Islamic law (art. 4) and defining the principles of Islamic law as limited to traditional sources (art. 219). Although art. 1 of the Tunisian constitution declares that "Tunisia is a free, independent sovereign state; its religion is Islam, its language Arabic and its system is republican," there is no "Sharia clause" stating what the role of Islamic law is. Moreover, art. 2 describes Tunisia as a "civil state," and art. 6 on religious freedom declares that "the state undertakes to disseminate the values of moderation and the protection of the sacred. . . ."

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One of the particular challenges for constitutionalism in the revolutionary context is the reestablishment of political authority on the part of the new regime following its loss by the old. In this situation, constitution-making has the potential to take on a substantive importance that transcends signaling the end of the transition period in between the two—the legal signing and sealing of the new contract, as it were. Without overstating the role of constitution-making in the overall success or failure of constitutionalist revolutions, it can serve as a key source of the legitimacy that the new regime must be widely seen to have, whatever its character.

To earn this, and to avoid some of the distortions to which revolutionary constitutionalism is distinctively prone, it is important that the constitution-making process and outcome are designed to take the local political context on the ground fully into account. Doing so, however, requires acknowledging a final paradox. The situation in which this is most urgent—where there is a temporarily ascendant party lacking the deeply entrenched and cross-cutting popular support of a genuinely dominant revolutionary movement—is the very situation in which it is least likely to occur. For here there is often no one with the legitimacy, power, or incentive to stand above faction and force compromise in the interest of the revolution itself.

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